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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 301

PAUL MOSER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

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The basic difference between the parties to this litigation is whether petitioner's rights are measured by the Treaty of 1850 or the Selective Service Act of 1940. Through World War I and World War II, the Selective Service System, in its quest for military strength, construed the Draft Acts as repealing the treaty. The State Department on the contrary, intent upon preventing the compulsory induction of our citizens abroad and preserving international obligations, sought to maintain the treaty. (See Government Brief, pp. 49-50, A-20). The situation which followed produced the controversy which this case poses.

The Treaty of 1850 provides that nationals of each coun-

try "residing or established in the other, shall be free from personal military service." The Selective Service Act of 1940 as amended provides in direct conflict that "every male citizen of the United States and every other male person residing in the United States . . . shall be liable for training and service . . . ." Does the added proviso permitting neutrals to be exempt upon filing an application and with debarment from citizenship bring the Draft Act into harmony with the Treaty?

1. The Government properly evaluates the Treaty in stating that the signatories did not contemplate "conditions on exemption which would render that grant nugatory", and in its conclusion that the treaty did not contemplate the denial of such rights as the exercise of one's profession as a consequence of freedom from military service. (Gov't Brief pp. 31-33). The Treaty contemplated that a Swiss citizen could reside, establish himself and work in the United States. And at the same time, it contemplated that he would be free from military service. But if petitioner is ineligible to citizenship under the Selective Service Act, then he is free from military service, but not free to work or practice his profession as a civil engineer. In most states including New York where he resides, aliens ineligible to citizenship may not practice a profession. *Konvitz The Alien and the Asiatic in American Law* (1946), pp. 171, 190, 203. It is submitted that if the Selective Service Act controls petitioner's status first in subjecting him to the draft, and secondly in exempting him only if he waives the rights to citzenship and to practice his profession that it is in contravention of the Treaty.

2. Petitioner sought exemption from military service under the Treaty (R. 30). Unlike the plaintiff in *Savorgnan* v. *United States*, 338 U. S. 491, his intent was disclosed and known to responsible officials of our government. The Legal

Adviser to the State Department, Green H. Hackworth, advised the Selective Service System of Mr. Moser's application on February 4, 1944 and added that "the Department has previously expressed the view that under the provisions of Article II of the Convention of Friendship, Commerce and Extradition concluded on November 25, 1850 by the United States and Switzerland, Swiss nationals in the United States are exempted from military service" (Gov't Br. A-57). If this Article of the Treaty was in full force and effect in February of 1944 when Moser claimed exemption, then he was exempt under the Treaty and not subject to the Selective Service Act of 1940. "If there was no 'liability' for service, the disqualification for citizenship under the penalty clause could not arise because the applicant had not made the 'application' referred to in the statute, as 'such application.' 'Such application' refers to an application to be relieved from 'such liability.' As there was no 'liability' for service, his act in applying for relief from a non-existent duty could not create the bar against naturalization." *Kristensen* v. *McGrath*, 340 U. S. 162.

3. Moser pursued an elaborate procedure to claim draft exemption under the Treaty—a procedure which the government now implies was meaningless, useless and unnecessary. The draft exemption application was revised to omit the statement that it was filed under the Selective Service Act and to delete the acknowledgment that it would debar the applicant from citizenship. The regulations were amended to omit the statement that a draft exemption claim would debar from citizenship. The Swiss Legation requested the State Department on behalf of Moser for exemption under the Treaty. The State Department requested Selective Service to exempt Moser under the Treaty. Moser advised his Board in writing that he was claiming

exemption under the Treaty (Gov't Br. 14-19, 65, A-57, R. 29-31).

The Swiss Legation was led to believe that this gave Moser and others like him the unconditional relief from military service it contended the Treaty extended to Swiss nationals. (See Pet. Br. Appendix C, p. 37; Appendix F, p. 44). Its advice to petitioner that he would not waive his right to apply for American citizenship was based upon the fact that the Treaty granted unconditional exemption. The normal procedure whereby naturalization is conferred, is through the courts—and the statement that the final decision "regarding your naturalization will remain solely with the Naturalization Courts" (R. 30-31) could refer to judicial naturalization and nothing more. Moser, a layman, could not be expected to realize the distinction between the "right to apply" and the "right to obtain" naturalization suggested by the government (Br. 83). We likewise disagree with the government's assertion that "recognition of a treaty right to exemption in no way constituted recognition of a concomitant right to be free from the consequences of debarment from citizenship" (Br. 81). Recognition of the Treaty to the Swiss and to Moser meant unconditional exemption without debarment from citizenship. (Pet. Br. App. A, p. 33)—a right to be free of the liability to serve under the inconsistent Selective Service Act. If Moser did not have this treaty right, then he was misled by our State Department and his exemption claim should not bar him from citizenship. This is not citizenship by estoppel as against the government but an interpretation of Mr. Moser's conduct in the light of equitable considerations. If he signed the exemption claim under duress, he would be relieved without an estoppel against the government. His conduct, if induced by mistaken advice

extended by the government, can likewise be relieved without asserting a claim of estoppel against the government.

We submit that this case is like *Cook* v. *United States*, 288 U. S. 102, where an inconsistent subsequent statute was brought into harmony with the earlier British Treaty to give the latter full effect in the light of a similar administrative construction. To give the Treaty full effect here is to affirm the grant of naturalization. To give the Selective Service Act full effect is to abrogate the Treaty and then petitioner would have been misled as to his rights by our State Department. In either event, the judgment below should be reversed.

Respectfully submitted,

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